APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-56085
D.C. No. CV-91-4483-CBM

AKHTAR HAMID, on Behalf of Himself and all Others Similarly Situated,
Plaintiffs-Appellants,

v.

PRICE WATERHOUSE, PRICE WATERHOUSE/U.K.; PRICE WATERHOUSE WORLD FIRM LTD.; PRICE WATERHOUSE/U.S.; ERNST & YOUNG; ABU DHABI, EMIRATE OF ABU DHABI; ABU DHABI INVESTMENT AUTHORITY; BANK OF AMERICA CORPORATION, BANKAMERICA CORP.; BANK OF AMERICA NT & SA; HILL & KNOWLTON; CONCORDE FINANCE & INVESTMENTS, GRP INVESTMENTS; INTERREDEC, INC.; INTERREDEC SOUTHERN CO.; *et al.*; FIRST AMERICAN CORP., FIRST AMERICAN BANKSHARES; PAUL ADAMS; JACK BEDDOW; A. VINCENT SCOFFONE; T. BERTRAM LANCE; INDEPENDENCE BANK; MANUEL NORIEGA; FULVIO DOBRICH; ROBERT ALTMAN; CLARK CLIFFORD; CLIFFORD & WARNKE,
Defendants-Appellees.

No. 92-56198
D.C. No. CV-91-4483-CBM

AKHTAR HAMID, on Behalf of Himself and all Others Similarly Situated,
Plaintiffs-Appellees,

v.

PRICE WATERHOUSE, PRICE WATERHOUSE/U.K.; PRICE WATERHOUSE WORLD FIRM LTD.; PRICE WATERHOUSE/U.S.; ERNST & YOUNG; ABU DHABI, EMIRATE OF ABU DHABI; ABU DHABI INVESTMENT AUTHORITY; BANK OF AMERICA CORPORATION, BANKAMERICA CORP.; BANK OF AMERICA NT & SA; HILL & KNOWLTON; CONCORDE FINANCE & INVESTMENTS, GRP INVESTMENTS; INTERREDEC, INC.; INTERREDEC SOUTHERN CO.; *et al.*; T. BERTRAM LANCE; INDEPENDENCE BANK; MANUAL NORIEGA; FULVIO DOBRICH; ROBERT ALTMAN; CLARK CLIFFORD; CLIFFORD & WARNKE,

Defendants,

and FIRST AMERICAN CORP., FIRST AMERICAN BANKSHARES, INC.; PAUL G. ADAMS; JACK BEDDOW; A. VINCENT SCOFFONE;

Defendants-Appellants.

No. 92-56199
D.C. No. CV-91-4483-CBM

AKHTAR HAMID, on Behalf of Himself and all Others Similarly Situated,

Plaintiffs-Appellees,

v.

PRICE WATERHOUSE, PRICE WATERHOUSE/U.K.; PRICE WATERHOUSE WORLD FIRM LTD.; PRICE WATERHOUSE/U.S.; ERNST & YOUNG; ABU DHABI, EMIRATE OF ABU DHABI; ABU DHABI INVESTMENT AUTHORITY; BANK OF AMERICA CORPORATION, BANKAMERICA CORP.; BANK OF AMERICA NT & SA; HILL & KNOWLTON; T. BERTRAM LANCE; INDEPENDENCE BANK; MANUEL NORIEGA; ROBERT ALTMAN; CLARK CLIFFORD; CLIFFORD & WARNKE, FIRST AMERICAN BANKSHARES, INC.; JACK W. BEDDOW; PAUL G. ADAMS; A. VINCENT SCOFFONE,

Defendants,

and CONCORDE FINANCE & INVESTMENTS; INTERREDEC, INC.; INTERREDEC SOUTHERN COMPANY, INC.; WESLEY COMPANY, INC.; RIVER OAKS, INC.; RIVER OAKS INVESTMENTS, INC.; STERLING BLUFF, INC.; GRP INVESTMENTS N.V.,

Defendants-Appellants.

Appeals from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted January 31, 1994

Filed April 7, 1995

Before: BROWNING, BOOCHEVER and KLEINFELD, Circuit Judges.

KLEINFELD, Circuit Judge:

This is an appeal from dismissal of a class action by depositors in the Bank of Credit & Commerce International ("BCCI"). The issues we resolve involve timeliness of appeal, judicial recusal, the derivative nature of the depositors' RICO claims, and the application of the Alien Tort Statute.

We have jurisdiction over depositors' claims pursuant to 28 U.S.C. § 1291. We review the district court's dismissal for failure to state a claim de novo. Oscar v. University Students Co-Operative Ass'n, 965 F.2d 783, 785 (9th Cir. 1992) (en banc). A district court's refusal to disqualify the sitting judge may be reversed only for an abuse of discretion. Thomassen v. United States, 835 F.2d 727, 732 (9th Cir. 1987).

I. Facts

This case was dismissed for failure to state a claim upon which relief can be granted, under Federal Rule of Civil Procedure 12(b)(6). We therefore are bound to evaluate whether the complaint states causes of action on the assumption that appellants could prove the averments. Pillsbury, Madison & Sutro v. Lerner, 31 F.3d 924, 928 (9th Cir. 1994).

Appellants claim to represent depositors of funds in what they call "the constellation of banks known as Bank of Credit & Commerce International ("BCCI")." They do not sue the "constellation of banks." They sue seventy-seven people, firms, and a foreign country.

The complaint alleges that the seventy-seven defendants illegally acquired various banks in the United States, caused deposits to be misused and misappropriated, and, by misrepresenting facts about BCCI, delayed the day when regulators would shut it down. By making the bank appear to be in better financial condition than it really was, some defendants are alleged to have enabled it to attract deposits which it otherwise would have been unable to obtain. Most of the complaint consists of elaborating the egregiousness of the misuse and misappropriation of funds, including allegations of financing international terrorism, narcotics, and arms dealing, and using bribery and fraud to keep governments from interfering with BCCI's and the defendants' activities, along with extensive polemical elaborations such as pointing out that the "BCCI pirates" were "men in business suits." The looting which allegedly caused the bank to be unable to pay the depositors included loans to insiders which were intended never to be repaid.

The district court dismissed depositors' RICO claims without leave to amend after they filed their third amended complaint. Appellants' arguments go to whether their claims were such that relief could be granted, not

whether they could have stated valid claims had they been given another chance to amend.

Facts dealing with particular issues are explicated more fully below, in the discussions of the issues.

II. Analysis

A. Appellate Jurisdiction

We must first decide whether the appeal was untimely, depriving us of jurisdiction. The complaint went through four iterations. The district court dismissed the third amended complaint on April 30, 1992. On May 11, the plaintiffs moved to recuse Judge Marshall, on the ground that the employment plans of her law clerks required her to be disqualified. They also filed a motion under Federal Rule of Civil Procedure 52(b) to vacate the April 30 judgment on the basis of Judge Marshall's alleged disqualification. They did not appeal at that time.

Judge Marshall issued a corrected version of her order and judgment May 20. Judge Byrne denied the motion to recuse Judge Marshall July 9. Judge Marshall then denied the Rule 52(b) motion July 27. Plaintiffs filed their notice of appeal August 19. The appeal is directed to the merits of the dismissal, not just to whether Judge Marshall should have been recused. The appellate jurisdiction issue is whether the appeal was timely as to the merits. On its face, an August 19 appeal from a May 20 judgment comes more than thirty days after the judgment. See Fed. R. App. P. 4(a)(1).

Appellees argue that the motion to vacate the judgment could not properly be characterized as a Rule 52(b) motion, that it should not be characterized as a Rule 59 motion which would toll the running of the thirty days, and that as a Rule 60(b) motion, it would not toll the thirty days. They are correct about Rule 52(b). That rule governs motions to amend findings of fact. This case was dismissed before trial; the district court did not

hear evidence or make findings. Nor was the motion directed toward correction of any findings. It related solely to recusal because of the law clerks' conflcts of interest.

Appellees are also correct that at the time the notice of appeal was filed, a Rule 60(b) motion was not among those which would toll the thirty days for filing notice of appeal. Fed. R. App. P. 4(a)(4).[1] We are nevertheless satisfied that appellants' motion, denominated incorrectly as a Rule 52(b) motion, should properly be deemed a Rule 59(e) motion. If a timely Rule 59 motion is filed, the thirty days for appeal does not begin to run until entry of the order on that motion. Fed. R. App. P. 4(a)(4).

The motion to vacate on the ground that the judge should have recused herself appears on its face to be no more of a Rule 59 than a Rule 52(b) motion, for the same reasons. Nevertheless, our precedents require that we treat a motion to vacate an order of dismissal as a Rule 59(e) motion. Mir v. Fosburg, 646 F.2d 342, 344 (9th Cir. 1980). Our precedents also require that we treat a motion which could have been made as a timely Rule 59 motion as though it were so made. Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1419 (9th Cir. 1984). This liberality has the practical effect of letting appeal wait until the timely post-trial motion has been decided. The 1993 amendments to Federal Rule of Appellate Procedure 4(a)(4) will no doubt obviate this confusion.[2]

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[1] The notice of appeal was filed August 19, 1992. The amendment at Fed. R. App. P. 4(a)(4)(F), which provides that the time for appeal runs from the entry of the order disposing of a motion for relief under Rule 60, was not yet in effect. Because we conclude that appeal was timely under the rules in effect in 1992, we do not have occasion to decide whether the 1993 amendment would affect pending appeals filed prior to the date of the amendment.

[2] Fed. R. App. P. 4(a)(4), as amended effective December 1, 1993, provides as follows: (4) If any party makes a timely motion

The appeal was timely as to the merits, not just as to recusal, so we have jurisdiction.

B. Recusal

The appellants claimed below, and argue here, that Judge Marshall should have recused herself from the case because of her law clerks' employment plans. The motion to recuse Judge Marshall and vacate the judgment on this ground was denied by a different district judge, Judge Byrne. We review the district court's denial of the recusal motion for abuse of discretion, Thomassen v. United States, 835 F.2d 727, 732 (9th Cir. 1987), and find none.

A federal judge must disqualify herself from any proceeding in which her impartiality might reasonably be questioned. 28 U.S.C. § 455(a). The test for recusal in this circuit is "'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 714 (9th Cir. 1990) (quoting Herrington v. Sonoma Cty., 834 F.2d 1488, 1503 (9th Cir. 1987)). Depending on how an individual judge manages her chambers, a law clerk's role in her decisionmaking may be quite significant. Even if the judge has no reason to recuse herself based upon her own circumstances, a law clerk's

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of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rule of Civil Procedure: . . . (B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment; (C) to alter or amend the judgment under Rule 59; . . . (F) for relief under Rule 60 if the motion is served within 10 days after entry of judgment. . . . The amendment changed the wording, changed the numbering of the subsections, and added the reference to Rule 60. Under the rule previously in effect, reference was made to motions under Rules 50(b), 52(b), and 59, but not 60.

relationships might cause the impartiality of decisions from that judge's chambers in which the clerk participates reasonably to be questioned.

However, "[i]f a clerk has a possible conflict of interest it is the clerk, not the judge, who must be disqualified. . . . [A] law clerk's acceptance of future employment with a law firm would [not] cause a reasonable person to doubt the judge's impartiality so long as the clerk refrains from participating in cases involving the firm in question." Hunt v. American Bank & Trust Co., 783 F.2d 1011, 1016 (11th Cir. 1986), quoted in Milgard, 902 F.2d at 714.

Two of Judge Marshall's law clerks' employment relationships are at issue, and they are different. Clerk One served as Judge Marshall's law clerk during the earliest stages of the case at bar, and he subsequently became an associate at Debevoise & Plimpton ("the Debevoise firm"). The Debevoise firm represents one of the named defendants, Price Waterhouse/United States. Clerk One filed a sworn declaration stating that he did no work at all on the case at bar while he clerked for Judge Marshall. He says he read the complaint (a public document) on his last day clerking and put it in Judge Marshall's file, but did not ever discuss the case with the judge or have any other involvement with the case during his clerkship. At the time he left his clerkship, Clerk One did not know that the Debevoise firm would subsequently appear for a defendant.

Clerk One had no involvement in the case at bar which would give rise to a disqualification of Judge Marshall. A reasonable person knowing all the facts regarding Clerk One's relationship with the Debevoise firm and his lack of involvement in the case at bar would not conclude that the impartiality of Judge Marshall's decisions in the case should be questioned. The rule laid down in Hunt and Milgard would prevent recusal on account of Clerk One's relationship with the Debevoise firm because Clerk

One did not work on the case at bar. His advice to and research for Judge Marshall could not be tainted if he gave no advice and did no research.

Judge Marshall's other law clerk, Clerk Two, did extensive work on the case. The question regarding Clerk Two is whether he had a disqualifying relationship with a law firm such that Judge Marshall should have taken him off the case. Mr. Lerach, plaintiffs' counsel, filed a declaration asserting that he had learned that (1) Clerk Two was on a "leave of absence" from Skadden, Arps, Slate, Meagher & Flom ("the Skadden firm") during his clerkship with Judge Marshall, (2) the Skadden firm represented Clark Clifford and Robert Altman, defendants in the case at bar, in a criminal case arising out of their involvement with BCCI, and had accepted service of process for them in the case at bar; and (3) Clerk Two "was scheduled" to return to the Skadden firm when he finished his clerkship, but "at the last moment" instead went to work at a different law firm "in the same building as Skadden, Arps and on a contiguous floor."

No reasonable person would suspect that a law clerk was slanting his advice to a judge in favor of a law firm because the clerk subsequently went to work for a different law firm "in the same building . . . on a contiguous floor." It is to filter out fantastic suggestions like this that the word "reasonable" is part of the recusal test.

However, a reasonable person might be concerned whether a law clerk's advice to a judge would be biased in favor of the position taken by a firm, if the law clerk had worked there before his clerkship, was on a leave of absence, and planned to work there after his clerkship. Cf. Hunt, 783 F.2d at 1015. Clerk Two, however, filed a declaration stating that this was not what had happened. He asserted that he had "terminated" his employment at the Skadden firm prior to his clerkship, and although the firm had made him an offer, he had not resumed employment with the firm and had accepted an

offer from a different firm. He also said that during the time he worked on the case at bar for Judge Marshall, he "was unaware" that the Skadden firm represented any clients in matters relating to BCCI, the firm did not appear for anyone in the case, and he had not communicated with anyone in the firm about the case. The Skadden firm in fact has not appeared for any party in the case at bar.

Judge Byrne accepted the truth of Clerk Two's representation that he did not know the Skadden firm had a role of any kind relating in any way to the BCCI case. We conclude that Judge Byrne did not abuse his discretion in deciding that Clerk Two's prior association with the Skadden firm required neither his removal from the case nor Judge Marshall's recusal because of his failure to remove himself.

Because of the very large number of defendants and law firms involved in this case, the likelihood that a law clerk would have some sort of connection to one of them is higher than in most cases, and the likelihood that that connection would matter is lower. A reasonable observer would more likely see any relationship "as implicit in the special circumstances [of the complexity of the case and large number of parties and law firms involved] rather than as an odd coincidence the failure to avoid which might suggest bias." In re Allied-Signal, Inc., 891 F.2d 967, 971-72 (1st Cir. 1989). The question of bias is one of whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. It is not a question of whether a line can be drawn connecting a person within chambers to a person or firm related, no matter how remotely, to a party in the case.

We need not determine whether a different conclusion could be reached on the facts. It is enough that Judge Byrne did not abuse his discretion in deciding that Judge Marshall need not have recused herself on account of her

law clerks' professional relationships with the two law firms.

C. Law of Nations

The complaint alleges that the seventy-seven defendants committed "torts in violation of the laws of nations and treaties of the United States." It does not specify which treaties, and the appellate briefs apparently do not dispute the correctness of the district court's dismissal of any claims based on violations of treaties. The complaint alleges the defendants violated the law of nations by causing the bank to loan money to criminals and to insiders and bribing or lying to bank regulators.

Because many of the members of the purported class are aliens, appellants argue the district court had jurisdiction to decide this claim under the Alien Tort Statute, 28 U.S.C. § 1350. The Alien Tort statute provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Id. The district court dismissed this cause of action without leave to amend because the depositors did not allege official action or a violation of the law of nations.

The Alien Tort Statute has seldom been invoked, so precedent is sparse for the definition of "law of nations." Analyzing the scope of the Alien Tort Statute, the Second Circuit noted that "although it has been with us since the first Judiciary Act . . . no one seems to know whence it came." IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). We have previously stated "[t]he debates that led to the Act's passage contain no reference to the Alien Tort Statute, and there is no direct evidence of what the First Congress intended it to accomplish." Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.), 978 F.2d 493, 498 (9th Cir. 1992).

We do not need to reach the issue of whether the law of nations applies to private, as opposed to governmental conduct. See Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (law of nations does not reach private, nonstate conduct); IIT, 519 F.2d at 1015 (violation of law of nations arises only when relationship between states or between individual and state is affected). Compare Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2nd Cir. 1980) (act of torture committed by state official violated law of nations) with Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791, 819 (D.C. Cir. 1984) (per curiam) (Edwards, J., concurring and Bork, J., concurring) (affirming dismissal of action by Israeli citizens against PLO terrorists and distinguishing Filartiga as involving official action). Deciding whether private conduct is subject to the law of nations would not resolve the case, because the complaint alleges that the Emirate of Abu Dhabi and the Abu Dhabi Finance Department were among the wrongdoers.

The wrongs alleged are in substance fraud, breach of fiduciary duty and misappropriation of funds. Although the conduct was international in scope, no violation of what has traditionally been the subject of international law is claimed. International law includes more than international treaties. See e.g., Estate of Marcos, 978 F.2d at 499 (official torture); Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2nd Cir. 1980) (same). But looting of a bank by its insiders, and misrepresentations about the bank's financial condition, have never been in the traditional classification of international law. These are garden variety violations of statutes, banking regulations, and common law. We agree with the view of the Second Circuit, as stated in IIT:

> [w]e cannot subscribe to plaintiffs' view that the Eighth Commandment "Thou shalt not steal" is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a

> violation of the law of nations arises only when there has been "a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se."

IIT, 519 F.2d at 1015 (quoting Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 297 (E.D. Pa. 1963)). That case was conceptually similar to the case at bar, in that it alleged an international scheme of fraud, conversion and corporate waste. See also Filartiga, 630 F.2d at 888-89 (distinguishing official torture, actionable under Alien Tort statute, from IIT). The standards alleged to have been violated by the defendants in the case at bar are not of a kind affecting the relationship between states or between an individual and a foreign state, and used by those states for their common good in dealings inter se.

Our reasons for adopting the IIT rule are well stated in Filartiga:

> The requirement that a rule command the "general assent of civilized nations" to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.

Filartiga, 630 F.2d at 881.

Because appellants' claims of fraud, breach of fiduciary duty, and misappropriation of funds are not appropriately considered breaches of the "law of nations" for purposes of jurisdiction under the Alien Tort Statute, Count IV was properly dismissed.

D. RICO

Most of the complaint purports to allege civil RICO claims. The statute provides that "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]" has a cause of action for which treble damages may be recoverable. 18 U.S.C. § 1964(c). Appellants allege that they were depositors in BCCI, and that because it violated the law and collapsed, it failed to pay them the money they were entitled to as depositors. Appellants allege that all four subsections of section 1962 [3] were violated by some or all defendants, by means of predicate acts ranging from wire and mail fraud to drug transactions and weapons dealing. The defendants include seventy-seven firms and individuals alleged to have looted the bank for personal gain, caused it to loan its money to criminals, caused it to appear more sound than it was to bank regulators, and otherwise to have contributed to its wrongful conduct or its inability to pay its depositors. The bank itself is not a defendant.

In order to plead a civil RICO claim, appellants must show that the defendant's violation of section 1962 was

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[3] Section 1962(a) provides that it is "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Section 1962(b) provides that it is "unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Section 1962(c) provides that it is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." Finally, section 1962(d) provides that it is "unlawful for any person to conspire to violate" the preceding three subsections.

the proximate cause of their injury. Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1317 (1992); Pillsbury, Madison & Sutro v. Lerner, 31 F.3d 924, 928 (9th Cir. 1994). Some of the wrongs alleged would tend to increase rather than reduce the ability of the bank to pay its debts. For those wrongs, the appellants have alleged no proximate cause linking the RICO violations with injury to their property.

Appellants have also pleaded various wrongs which had the effect of making BCCI less able to pay its debts. As depositors, the members of the appellant class are creditors of BCCI. Bank of Marin v. England, 385 U.S. 99, 101 (1966); Brown v. New York Life Ins. Co., 152 F.2d 246, 249 (9th Cir. 1945). They allegedly loaned money to BCCI which, because of various wrongs by defendants, it was unable to pay back. To the extent that the alleged wrongs reduced the ability of the bank to pay its debts, or caused it to be in business for a longer time than it should have been so that it could continue to borrow money from depositors fooled about its true condition, the wrongs would have the practical consequence of harming the depositors.

The question is whether persons whose injury is in this manner indirect have standing to assert a RICO claim. BCCI, the allegedly dishonest and defaulting debtor, is not a defendant. Instead, other people and firms, who allegedly contributed to BCCI's condition, but who themselves had no direct relationship to the appellants and caused them no direct harm, are the defendants. Suppose the "BCCI pirates" looted the bank just as the complaint says. Can a depositor in a bank sue a bank robber?

The standing question has been answered persuasively by the Third Circuit, in Popkin v. Jacoby (In re Sunrise Sec. Litig.), 916 F.2d 874, 880 (3d Cir. 1990). In that case too, depositors of a failed bank sued the insiders whom they claimed looted it and misrepresented its con-

dition. The claims were substantially the same as in the case at bar:

> The essence of the complaint is that defendants misrepresented the financial condition of [the bank] by failing to disclose that they had mismanaged [the bank] rendering the institution insolvent, and that they had employed deceptive operating practices, which prevented federal and state regulators from acting in a timely manner to forestall the insolvency of [the bank].

Id. at 883. The Third Circuit held that depositors asserting a RICO claim because the bank had become unable to pay its debts should be treated the same as shareholders in a corporation. For both classes, where the harm is to all the members, and the injuries claimed by the plaintiffs are not separate and distinct from those to shareholders or depositors generally, the RICO claim is derivative and there is no standing on the part of the shareholders or depositors to assert it.

> The Second Circuit has ruled the same way. As a general rule, wrongdoing by bank officers that adversely affects all depositors creates a liability which is an asset of the bank, and only the bank or its receiver may sue for its recovery.

Adato v. Kagan, 599 F.2d 1111, 1117 (2d Cir. 1979).

Sunrise's analogy to shareholder suits is sound. Creditors of a bankrupt corporation generally do not have standing under RICO. Manson v. Stacescu, 11 F.3d 1127, 1130 (2d Cir. 1993). "The creditor generally sustains injury only because he has a claim against the corporation. The creditor's injury is derivative of that of the corporation and is not caused proximately by the RICO violations." Id. When a creditor suffers injury that is "independent of the firm's fate," his injury is direct and he may pursue his own remedy; otherwise the injury is derivative and the creditor must take his "place in line"

as a creditor in the bankruptcy action. Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago, 877 F.2d 1333, 1336-37 (7th Cir. 1989). Cf. Sparling v. Hoffman Constr. Co., Inc., 864 F.2d 635, 640 (9th Cir. 1988) (shareholder lacks standing to assert RICO claim unless he shows either an injury distinct from that to other shareholders or a special duty owed by the defendant to the shareholder).

The rationale supporting the analogy is compelling. "[P]ermitting depositors to bring individual actions for such injuries [] would invariably impair the rights of other general creditors and claimants with superior interests." Sunrise, 916 F.2d at 887. Under the facts of Sunrise,

> continuation of plaintiffs' suit could disrupt the efforts of FDIC to recover the [bank's] assets, which were depleted by defendants' mismanagement and wrongdoing, for equitable distribution among all depositors and creditors in accordance with the federal priority scheme. . . . According to the FDIC, permitting plaintiffs to sue directly for claims emanating from injury to the [bank] would circumvent the priority scheme by enabling depositors to recover the [bank's] assets in advance of other general creditors and claimants with superior interests, such as secured creditors. This result, argues FDIC, is both inequitable and inefficient, and threatens to further complicate the immense taks of liquidating the [bank's] assets.

Id. at 888-89 (emphasis in original). The Seventh Circuit has made the same point in the context of a shareholder's RICO claim, noting that allowing the derivative suit would lead to double counting of damages and would interfere with an equitable liquidation process:

> Recovery by the firm, followed by division according to entitlements, is especially important when the firm

> has landed in bankruptcy. Suits by shareholders, guarantors, and the like may well be efforts to divert the debtor's assets-to pay off one set of creditors . . . while keeping the proceeds out of the hands of the firm's other creditors.

Mid-State, 877 F.2d at 1336.

This line of reasoning applies fully to the case at bar. BCCI is being liquidated in international proceedings in Luxembourg. Its assets located in the United States have been forfeited and are subject to control of the Justice Department. The appellants in this case have claims similar to those of many other potential claimants. Their claims, if allowed in this lawsuit, would enable them to jump ahead of other creditors in priority and obtain greater shares of the failed bank's assets and of the assets of any wrongdoers who may owe money to the failed bank on account of their wrongs. See United States v. BCCI Holdings (Luxembourg), S.A., —— F.3d ——, Nos. 93-5296, 93-5299, 1995 WL 56674 (D.C. Cir. Feb. 14, 1995). Half of the sums recovered will be surrendered to a global liquidation fund set up to facilitate a "general global distribution to creditors and depositors." Id. at *1. The other half has been reserved for the Attorney General's discretionary allocation to purposes including offsetting losses to the Federal Deposit Insurance Corporation, id., and "protect[ing] the rights of innocent persons." Id. at *7, quoting 18 U.S.C. § 1963 (g)(1). Recently, these appellants attempted to convince one of our sister circuits that they were entitled to an interest in the property so forfeited, the "nature and extent" of which interest could be found in the complaint filed in the case at bar. Id. at *2. Appellants' attempt to jump in line ahead of other creditors was rebuffed in that case, and it is rebuffed here.

Appellants would have us distinguish Sunrise and the other cases on derivative claims, on the basis of Hayes v. Gross, 982 F.2d 104 (3d Cir. 1992). In Hayes, pur-

chasers of stock alleged that they paid too much because of fraud on the market, and sued the officers and directors of the corporation under the Securities Exchange Act of 1934. The Third Circuit distinguished Sunrise, and held that the claim was not derivative. It reasoned that the injury claimed was distinct from the injury to the corporation and the indirect injury to stockholders generally, and also that the claim would neither prejudice the corporation and its other stockholders not permit a double recovery for the same injury. In that case, the harm would of course be only to the shareholders who bought in a market tainted by the misrepresentations, not to those who had bought before, and not to the corporation. We need not decide whether we would follow Hayes, because the facts of the case at bar are analogous to Sunrise, not Hayes.

Because the RICO claims were all properly dismissed for lack of standing, as derivative, we do not reach the questions raised by the parties as to the extraterritorial reach of RICO. We understand the argument to be whether Congress has the power to regulate the foreign conduct at issue, not whether the district court had jurisdiction to decide whether a claim upon which relief could be granted had been pleaded. We assume without deciding that RICO would apply to the foreign wrongs. We do not reach the other rationales articulated by the district court as a basis for dismissal.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim No. 91-0655

UNITED STATES OF AMERICA

-v-

BCCI HOLDINGS (LUXEMBOURG), S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED, *Defendants.*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
CRIMINAL TERM

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PEOPLE OF THE STATE OF NEW YORK

-v-

BCCI HOLDINGS (LUXEMBOURG), S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED, *et al.*, *Defendants.*

PLEA AGREEMENT

Parties and Purpose

WHEREAS, the United States of America, by its attorneys for the United States Department of Justice (the "DOJ"), the People of the State of New York, by the District Attorney for New York County, Robert M. Morgenthau (the "DANY") and Brian Smouha, Jacques Delvaux and Constant Franssens, as Commissairies of BCCI Holdings (Luxembourg) S.A. ("BCCI Holdings"); Brian Smouha, as Commissaire of Bank of Credit and Commerce International, S.A. ("BCCI SA"); Ian Wight and Robert Axford, as Joint Provisional Liquidators of Bank of Credit and Commerce International (Overseas) Ltd. ("BCCI Overseas"); and Ian Wight and Robert Axford as Joint Provisional Liquidators for International Credit and Investment Company (Overseas) Limited ("ICIC") (all such persons acting in the capacities so indicated or their duly appointed successors, being hereinafter collectively referred to herein as the "Court Appointed Fiduciaries"), have engaged in discussions with respect to the subject matter hereof pursuant to Rule 11 of the United States Federal Rules of Criminal Procedure, and, with respect to DANY, under New York law;

WHEREAS, the DOJ and the DANY have pursued investigations into the business and affairs of BCCI Holdings, BCCI SA, BCCI Overseas and ICIC (collectively, "BCCI"), which investigations have developed, for the benefit of law enforcement and regulatory agencies, significant evidence of criminal activity by the prior management of BCCI and both the DOJ and the DANY continue to pursue investigations into the impact of that activity;

WHEREAS, prior to July 5, 1991, BCCI had been a worldwide banking organization with operations in approximately 69 countries and on July 5, 1991 BCCI was closed by bank regulatory authorities in the United King-

dom, the United States, the Cayman Islands, Luxembourg and elsewhere;

WHEREAS, BCCI is presently insolvent, and is subject to insolvency or liquidation proceedings pursuant to the laws of Luxembourg and the Cayman Islands and, in the case of certain agencies and branches of BCCI SA, are awaiting liquidation or in the process of being liquidated in the States of California and New York, and elsewhere;

WHEREAS, the failure of BCCI is likely to cause thousands of innocent depositors and other creditors throughout the world to suffer losses in the aggregate in billions of dollars;

WHEREAS, in order to address the foregoing, the Court Appointed Fiduciaries have been appointed to act as joint provisional liquidators and/or commissaires by courts in the respective domiciles of the BCCI companies to collect all BCCI assets located throughout the world, and liquidate the same for the purpose of achieving the greatest possible distribution to all lawful creditors and depositors of BCCI on a worldwide basis;

WHEREAS, in furtherance of the Court Appointed Fiduciaries' efforts, the Court Appointed Fiduciaries have filed a petition in Bankruptcy Court in the Southern District of New York under Title 11, Section 304 of the Bankruptcy Code seeking the turnover of all BCCI assets in the United States to the Court Appointed Fiduciaries (the "Section 304 Proceeding") and a Temporary Restraining Order has been issued in connection therewith;

WHEREAS, former management and operators of BCCI fraudulently and secretly acquired (1) direct or indirect ownership and control over the shares of First American Bankshares Inc., Washington, D.C. ("First American"), the former National Bank of Georgia,

Atlanta, Georgia, and Independence Bank, Encino, California ("Independence Bank"), and (2) an interest in the former CenTrust Savings Bank, Miami, Florida ("CenTrust");

WHEREAS, the DOJ and federal banking regulators intend to minimize the risk of potential loss to the Bank Insurance Fund and United States taxpayers by obtaining a fund which could provide additional capital to depository institutions and safeguard the Bank Insurance Fund, if either are necessary, in connection with BCCI's secret investment in U.S. financial institutions;

WHEREAS, it appears that the identifiable assets of BCCI in the United States, exclusive of any stock ownership in First American and Independence Bank, constitute approximately $550,000,000 in cash and other assets;

WHEREAS, the prior management and operators of BCCI are no longer involved in any effective decision-making capacity with BCCI, and its worldwide affairs are subject to the control of the Court Appointed Fiduciaries whom the DOJ, the DANY and the other parties hereto recognize, based upon various court appointments, as having full right and authority to act on behalf of BCCI and whom the DOJ and the DANY are willing to support in their efforts to collect and appropriately liquidate and distribute the assets of BCCI in an orderly and fair manner, consistent with the protection of innocent victims of BCCI and the due administration of justice;

WHEREAS, responsible authorities in the United States, the United Kingdom, the Cayman Islands and Luxembourg desire that the assets of BCCI be distributed by the Court Appointed Fiduciaries only in a manner which (a) protects United States taxpayers from potential losses to the banking organizations illegally acquired by BCCI, (b) provides prompt recovery to innocent depositors, creditors and other victims of BCCI, and

(c) ensures, as set forth herein, that no monies are paid to persons who have violated laws forbidding narcotics trafficking, terrorism, money laundering, crimes of violence or other acts generally recognized as felonies or similar crimes under the laws of the United States and other countries subscribing to recognized norms of international justice;

WHEREAS, pleas of guilty entered by the Court Appointed Fiduciaries, on behalf of BCCI, to substantial criminal charges in the United States will address significant U.S. law enforcement interests that the parties hereto believe, once the pleas provided for herein are entered and accepted by the relevant courts and all of the provisions of this Agreement are implemented as provided herein, will resolve all criminal investigations, charges, indictments and all criminal and civil proceedings against BCCI concerning matters occurring before July 5, 1991 subject to the terms and conditions set forth herein, thereby removing a major impediment and in fact facilitating the distribution of substantial BCCI assets to innocent depositors, creditors and other victims of BCCI;

WHEREAS, in addition to the DOJ and the DANY, responsible international law enforcement and regulatory authorities in the United Kingdom, the Cayman Islands and Luxembourg also desire a resolution which balances interests in obtaining an appropriate penalty for illegal corporate conduct and compensation of innocent depositors, creditors and other victims of BCCI;

WHEREAS, the entry of pleas of guilty by the Court Appointed Fiduciaries, on behalf of BCCI, to criminal charges in the United States District Court for the District of Columbia (the "U.S. District Court") and the Supreme Court of the State of New York (the "N.Y. Supreme Court") as provided herein is not intended by the parties hereto to preclude the criminal prosecution of or any civil action against any culpable BCCI officers,

employees, agents or other entities (other than BCCI) or wrongdoers;

WHEREAS, the parties believe that the entry of pleas of guilty by the Court Appointed Fiduciaries, on behalf of BCCI, to criminal charges as provided herein will materially assist in the prosecution of culpable persons and entities (other than BCCI) by permitting DOJ, DANY, and other enforcement authorities to obtain greater access to documents and witnesses through the full cooperation and assistance of the Court Appointed Fiduciaries.

NOW, THEREFORE, the United States of America through the DOJ, the DANY, the Board of Governors of the Federal Reserve System (the "Board of Governors"), the Federal Deposit Insurance Corporation ("FDIC"), the Resolution Trust Corporation (the "RTC"), the Office of Thrift Supervision (the "OTS"), the Office of the Comptroller of the Currency (the "OCC"), the Securities and Exchange Commission ("SEC") the Superintendent of Banks of the State of New York ("N.Y. Banking"), the Superintendent of Banks of the State of California ("California Banking") and the Court Appointed Fiduciaries, with the assistance and support of the Serious Fraud Office of the United Kingdom (the "Serious Fraud Office"), the Public Prosecutor for Luxembourg, and the Attorney General of the Cayman Islands hereby covenant and agree as follows:

THE PLEAS

The Federal Plea

1. The Court Appointed Fiduciaries, acting on behalf of BCCI, will cause BCCI to waive venue and plead guilty in the U.S. District Court to the information, attached hereto as Exhibit A-1 (the "U.S. Information"), which charges BCCI with conspiracy to conduct the affairs of an enterprise through a pattern of racketeering

activity in violation of 18 U.S.C. Sections 1962(c) and (d).

2. The Court Appointed Fiduciaries fully understand the nature and elements of the crimes with which BCCI has been charged in the U.S. Information.

3. The Court Appointed Fiduciaries will cause BCCI to plead guilty because, to the best of their knowledge, they have determined after due inquiry that acts of prior management of BCCI establish that BCCI, as the entity responsible for the acts of such management, is in fact guilty of the charges contained in the U.S. Information and, in causing BCCI to plead guilty to the U.S. Information, the Court Appointed Fiduciaries, on behalf of BCCI, will accept the factual statements set forth in the U.S. Information and the conclusion of the DOJ that these statements provide a legally sufficient factual basis for the plea contemplated in paragraph 1 above.

The New York County Plea

4. The Court Appointed Fiduciaries, acting on behalf of BCCI, will cause BCCI to plead guilty in the N.Y. Supreme Court to counts one through six of New York County Indictment Number 8090/91 ("N.Y. Indictment") (Attached hereto as Exhibit A-2), it being expressly understood that the DANY will move to withdraw, as to BCCI only, at the time of the plea of guilty the second full paragraph of page 5 of said indictment, and the Court Appointed Fiduciaries will consent to that motion.

5. The Court Appointed Fiduciaries fully understand the nature and elements of the crimes with which BCCI has been charged in the N.Y. Indictment.

6. The Court Appointed Fiduciaries will cause BCCI to plead guilty because, to the best of their knowledge, they have determined after due inquiry that acts of prior management of BCCI establish that BCCI, as the entity responsible for the acts of such management, is in fact

guilty of the crimes charged in counts one through six of the N.Y. Indictment as amended pursuant to paragraph 4 and, in causing BCCI to plead guilty to those crimes, the Court Appointed Fiduciaries, on behalf of BCCI, accept that the factual statements set forth in counts one through six of the N.Y. Indictment provide a legally sufficient factual basis for the plea contemplated in paragraph 4 above.

7. The Court Appointed Fiduciaries, on behalf of BCCI, will join with the DANY's recommendation that, a fine of $10,000,000 under the New York Penal Law section 80.15 be imposed, jointly and severally, on the corporate entities defined above as BCCI, payable as provided in paragraph 12 below.

FORFEITURE AND DISGORGEMENT

8.(a) Upon execution of this Agreement by the parties, the Court Appointed Fiduciaries will cause $5,000,000 to be paid as an interim capitalization payment to Independence Bank (the "Interim Capitalization Payment") in exchange for newly issued shares of Independence Bank, which shares shall represent all the outstanding shares of Independence Bank. The shares to be issued pursuant to the Interim Capitalization Payment shall be issued in the name of one or more of the entities constituting BCCI herein and shall be subject to the divestiture Order of the Board of Governors of May 6, 1991 and placed in a trust to manage, control and sell Independence Bank, with an independent trustee to be selected by the Court Appointed Fiduciaries, which trust and trustee will be subject to the approval of the Board of Governors, California Banking, DOJ, and DANY, and subject to paragraph 9(b).

(b) Upon the filing of the U.S. Information, pursuant to 18 U.S.C. Section 1963(d)(1), the DOJ, on behalf of the United States, shall apply to the U.S. District Court with the consent of the Court Appointed Fiduciaries for

an order directing that certain BCCI assets located in the United States, more fully described in Exhibit B, be paid into a custodial account maintained by the Treasury Department in a segregated account within the Department of Justice Seized Asset Deposit Fund in the name of the U.S. District Court (the "Custodial Account"). As proceeds from paragraphs 9(b) through (e) becomes available, the DOJ, on behalf of the United States, shall apply to the U.S. District Court with the consent of the Court Appointed Fiduciaries for appropriate orders effectuating the transfer of proceeds to the Custodial Account for disbursement. During the term of this Agreement, funds in the Custodial Account shall draw interest, which interest will accrue to the Custodial Account. Upon entry of the Forfeiture Order as provided herein, the Custodial Account will be transferred from the Seized Asset Deposit Fund to the Department of Justice Assets Forfeiture Fund. Notice of any payments and transfers relating to the Custodial Account shall be made to the parties by the Treasury Department.

9. Upon entry of a judgment of conviction on the U.S. Information and an order of forfeiture issued pursuant to 18 U.S.C. Sections 1963(a)(1), (2) and (3) (the "Forfeiture Order"), BCCI shall forfeit to the United States the following property of BCCI located in the United States:

(a) all of BCCI's ownership interest in deposits and other assets originally held in those banks and brokerage firms identified on Exhibit B hereto and then paid into the Custodial Account under paragraph 8(b),

(b) the net proceeds from the sale or other disposition or transfer of any stock, security or other interest in Independence Bank, but not the stock, security or other interest itself,

(c) the net proceeds from the sale or other disposition or transfer of any stock, security or other

interest in First American, but not the stock, security or other interest itself,

(d) the balance of the liquidation estates of the Los Angeles and New York agencies of BCCI SA, but not the estates themselves, upon completion of liquidation proceedings conducted by the New York Banking and the California Banking in accordance with the laws of California and New York. For purposes of the foregoing, the "liquidation estates" shall consist of all of the rights and interests of the Superintendent of Banks of the states of New York and California under their respective state law banking statutes, with respect to the assets of BCCI S.A. located in their respective states and the assets of the New York and California agencies of BCCI S.A. The liquidation estates do not include the assets enumerated in Exhibit B, and

(e) the entirety of BCCI's interests in all other property, not identified in clauses 9(a) through (d), located in the United States, including, without limitation, real property and all tangible and intangible personal property.

10. In furtherance of the ongoing liquidation activities of the New York Banking and the California Banking, the New York Banking and the California Banking will attempt to complete their respective liquidations as soon as practicable consistent with their respective statutes and the determinations of their respective courts. Thereafter, they will transfer to the Custodial Account the United States' forfeiture interest in the entire remainder of the liquidation estates, as quickly as reasonably possible.

11. As promptly as practicable after the entry of the Forfeiture Order and, to the extent possible, pending the completion of any proceedings that may be required under 18 U.S.C. Section 1963(l), disbursements shall be made from the Custodial Account to a U.S. Disgorge-

ment, Compensation and Penalty Fund maintained by the Treasury Department within the Department of Justice Assets Forfeiture Fund (the "U.S. Fund") and, subject to paragraphs 13, 14, and 17 below, to a Worldwide Victims and Creditors Compensation Fund maintained by the Court Appointed Fiduciaries (the "Worldwide Victims Fund") as follows:

(a) subject to clause (d) below, the first $100,000,000 deposited in the Custodial Account shall be disbursed to the U.S. Fund for the purposes set forth in paragraph 12;

(b) the next $100,000,000 deposited in the Custodial Account shall be disbursed to the Worldwide Victims Fund;

(c) subsequent deposits to the Custodial Account shall be concurrently disbursed in equal amounts to the U.S. Fund and the Worldwide Victims Fund, except that monies due to the U.S. Fund shall be paid without regard to delays, if any, under paragraph 13(a);

(d) prior to the disbursements described in clauses (a) through (c) of this paragraph 11, the Interim Capitalization Payment described in paragraph 8(a) shall be refunded to the Court Appointed Fiduciaries.

12. As determined in the sole discretion of the Attorney General of the United States (the "Attorney General"), the U.S. Fund shall be used for the following purposes:

(a) to minimize the risk of potential loss to the Bank Insurance Fund of the FDIC and United States taxpayers by providing additional capital, upon the request of the FDIC, OCC and the Board of Governors, to the subsidiary banks of First American, and Independence Bank, or to reimburse the Bank Insurance Fund for any losses it incurs in connection with the sale or disposition of these institutions;

provided, however, that when all said institutions are sold or otherwise disposed of an amount equal to any such capital infusion or insurance fund payment shall first be repaid to the U.S. Fund, with the balance of the net proceeds of the sale or disposition paid in equal amounts through the Custodial Account to the U.S. Fund and the Worldwide Victims Fund;

(b) within one week of the entry of the Order of Forfeiture, the Court Appointed Fiduciaries shall apply for remission, and the Attorney General will remit as soon as available $10,000,000 out of funds deposited in the U.S. Fund pursuant to paragraph 11(c) above for the sole purpose of paying the fine imposed or to be imposed upon BCCI in the N.Y. Supreme Court pursuant to paragraph 7 of this Agreement; it being understood and agreed that the distribution set forth under this paragraph shall take precedence over all other distributions from the U.S. Fund, obtained under paragraph 11(c), unless there is written consent otherwise of both the Attorney General and the DANY;

(c) to satisfy a punitive forfeiture in an amount to be determined in the sole and absolute discretion of the Attorney General;

(d) to compensate the DOJ for the reasonable costs of investigation and prosecution of BCCI and any former employees, officers or agents of BCCI, or other individuals who assisted its criminal activities;

(e) to compensate the DANY for the reasonable costs of its investigation and prosecution of BCCI and continued investigation of the activities of former employees, officers or agents of BCCI, should DANY make an application for equitable sharing;

(f) for restitution to victims of BCCI, which may include remission to the Court Appointed Fiduciaries

in accordance with 18 U.S.C. Section 1963(g) for the purpose of facilitating an increase in assets available for distribution by the Court Appointed Fiduciaries to innocent worldwide victims of BCCI, and which may include claims related to the failure of CenTrust, if any;

(g) to reimburse the Board of Governors, FDIC, RTC, OTS, OCC, SEC for the reasonable costs of their investigations of, and civil and administrative proceedings against BCCI and related persons and entities.

(h) to take other appropriate measures as authorized pursuant to 18 U.S.C. Sections 1963(f) and (g).

The DOJ will notify DANY of disbursements from the U.S. Fund.

13. Disbursements to the Worldwide Victims Fund are conditioned on availability of funds under paragraph 11, establishment of a screening mechanism under paragraph 14, and, as provided in clause (a) below, the cooperation requirements of paragraphs 17 and clauses 21(c) and (e). The amounts payable to the Worldwide Victims Fund shall be paid every 15 days beginning as soon as practicable after entry of the Forfeiture Order in increments of $50,000,000 (or such lesser amounts as are available) until all funds are paid unless:

(a) DOJ or DANY have filed written notice with the Court Appointed Fiduciaries specifying the details of a violation of or a failure to comply with paragraph 17, or in the case of an alleged violation of or failure to comply with clauses (c) and (e) of paragraph 21, upon similar written notice filed by the DOJ with the Court Appointed Fiduciaries, in which case payments will be deferred until the parties resolve any dispute over such cooperation. Any dispute not resolved by the parties within 10 days

of such notification may be referred by any party to the District Court for resolution. Upon resolution of any objection under this section, transfers will resume promptly as provided above.

(b) During the pendency of any delay by virtue of objections under clause (a) above, interest which accrues on these funds held in the Custodial Account shall accrue to the benefit of the Worldwide Victims Fund and shall be payable at the same time as and together with the principal to which it relates.

14. Prior to the transfer of funds to the Worldwide Victims Fund pursuant to paragraph 13, the Court Appointed Fiduciaries shall have established an international screening mechanism acceptable to the DOJ and DANY that assures, consistent with the laws of the countries governing the distribution of the Worldwide Victims Fund by the Court Appointed Fiduciaries, that such funds will be distributed only to innocent depositors, creditors and other victims of BCCI whose claims are not derived directly or indirectly through violations of United States or other laws concerning narcotics, terrorism, money laundering, crimes of violence, or other acts generally recognized as felonies or similar crimes under the laws of countries subscribing to recognized norms of international justice. The screening mechanism shall, where appropriate, incorporate participation of the Bank of England, the Serious Fraud Office, the Public Prosecutor of Luxembourg, and the Attorney General of the Cayman Islands and the assistance of the United States Federal Bureau of Investigation and the DANY.

15. In the unlikely event that funds in the Worldwide Victims Fund and funds otherwise available to the Court Appointed Fiduciaries exceed the amount required for full compensation of the innocent depositors, creditors and other victims of BCCI described in paragraphs 14 above, the excess funds will be returned to the United

States for deposit into the U.S. Fund and distribution as contemplated in paragraph 12 above.

MISCELLANEOUS PROVISIONS

16. The parties hereto agree to assist each other in effectuating the Forfeiture Order and taking whatever action may be reasonably necessary to protect the interests of the parties hereto in the property ordered forfeited, including, without limitation, identifying and collecting BCCI assets and causing the transfer thereof to the Custodial Account, promptly addressing claims and objections to the Forfeiture Order filed by third parties pursuant to 18 U.S.C. Sections 1963(g) and/or 1963(l) and, subject to the terms of this Agreement, transferring funds to the U.S. Fund and the Worldwide Victims Fund as provided herein.

17.(a) The Court Appointed Fiduciaries agree to cooperate fully with the DOJ and the DANY in their ongoing investigations and related proceedings concerning BCCI and BCCI related activities, individuals and entities, to the fullest extent allowed under applicable United States and foreign law.

(b) As used in this paragraph:

(i) "investigative information" includes documents, records, tangible evidence or other information concerning BCCI and related activities, individuals and entities requested by DOJ or DANY.

(ii) "production" of investigative information means to obtain access to, provide originals of where practicable, make and provide copies of, and permit use of such information, as specified by the requesting party.

(c) In the event that the Court Appointed Fiduciaries conclude that production of investigative in-

formation violates a relevant and applicable foreign law, the Court Appointed Fiduciaries will promptly:

(i) notify the requesting party detailing the legal prohibition or limitation to production, access, copying or other use of said information;

(ii) comply, in as complete a form as possible, with the request, in a manner that does not result in a violation of the asserted foreign law inhibition; and

(iii) take such reasonable steps, including seeking appropriate waivers from appropriate persons and entities, and making applications or joining in applications made by the requesting party, at the discretion of the requesting party, to appropriate courts or other bodies to attempt to meet the foreign legal requisites necessary to permit compliance or overcome the foreign legal barriers inhibiting compliance.

(d) Cooperation hereunder includes, but is not limited to the following, consistent with clauses (a), (c), and (e) through (g) herein:

(i) The Court Appointed Fiduciaries agree to produce to the DOJ and the DANY any investigative information that is subject to the control of the Court Appointed Fiduciaries.

(ii) The Court Appointed Fiduciaries agree to use their good offices, when requested by either the DOJ or the DANY, to facilitate production of investigative information in the custody or control of third parties.

(iii) At the request of the DOJ or the DANY, the Court Appointed Fiduciaries will direct any employee or other person subject to their control to testify in any duly convened grand jury,

court, or other criminal, investigative, or administrative proceeding, and will, in addition, use their good offices and, at the expense of the DOJ, all reasonable efforts to persuade former employees, clients, and shareholders of BCCI, and others to cooperate with the requesting party and to testify in any such proceeding.

(iv) The Court Appointed Fiduciaries agree to waive any privileges, including the attorney-client, accountant-client, and work product privileges, with respect to any investigative information existing as of July 5, 1991.

(v) The Court Appointed Fiduciaries further agree to provide investigative information created after July 5, 1991 to the DOJ and the DANY relating to the tracing and locating of assets that flowed from or to BCCI and BCCI related entities and persons as a result of criminal activity.

(e) With respect to investigative information created after July 5, 1991, it is not the intent of this Agreement to require the Court Appointed Fiduciaries to waive the attorney client privilege in connection with documents or communications reflecting or containing legal advice to the Court Appointed Fiduciaries or attorney work product related thereto or otherwise pertaining to the subject matter of their appointments.

(f) Where investigative information is requested that:

(i) was created after July 5, 1991,

(ii) was created for the purpose of negotiating settlement of specific creditor or depositor claims, and

(iii) would, in the opinion of the Court Appointed Fiduciaries, pose a substantial risk of jeopardizing the specific negotiations or materially interfere with the lawful performance of their fiduciary obligations, the Court Appointed Fiduciaries will so inform the requesting party and provide the requesting party an estimate of how long the perceived inhibition to disclosure would persist, and will pursue, if requested by the requesting party, efforts, including resort to an appropriate judicial body, to permit the disclosure of the requested information under circumstances that will preserve confidential and secure treatment of the information and avoid the risk of interference noted above.

(g) The DOJ agrees to assume the reasonable costs of obtaining production of the foregoing for the DOJ and the DANY, upon advance notice of the approximate cost and a statement of the reasons why such production is necessary.

18. As part of the sentence imposed in connection with the entry of the pleas contemplated in paragraphs 1 and 4 above, the Court Appointed Fiduciaries agree that BCCI shall be barred from doing business within the United States except upon written notice to the DOJ and the express written permission of the appropriate Department or Agency of the United States, and with respect to doing business within the State of New York, except upon the further written notice to the DANY and the express written permission of the New York Banking, and with respect to business in the State of California, except upon the express written permission of California Banking. This provision is not intended to limit the activities of the Court Appointed Fiduciaries, pursuant to their respective court or other appointments, within

the United States, in connection with the liquidation of BCCI. Additionally, before any person, other than the Court Appointed Fiduciaries, is appointed to act in a trustee or fiduciary capacity affecting assets located in the State of New York, the approval of the DANY and the New York Banking shall be obtained, and with respect to assets in California, the approval of California Banking shall be obtained.

19. The Court Appointed Fiduciaries will obtain, with the assistance of DOJ and DANY where appropriate, all regulatory, judicial, administrative or other filings, notices, applications, consents, orders or approvals required to be obtained in order for the Court Appointed Fiduciaries, on behalf of BCCI, to satisfy fully their obligations under this Agreement, including seeking any necessary modification of the Temporary Restraining Order, the Court Appointed Fiduciaries' request for a preliminary injunction in the Section 304 Proceeding and/or the Consent Order entered in connection with the 304 Proceeding on October 16, 1991.

20. The Court Appointed Fiduciaries agree to:

(a) consent to the assessment in the amount claimed in the civil monetary penalty action brought by the Board of Governors against BCCI on July 29, 1991; and

(b) comply with the Divestiture Orders issued by the Board of Governors on March 4, 1991 and May 6, 1991 (the "Board Orders").

The Board of Governors agrees to stay and not seek execution of that assessment against any property forfeited under this Agreement or located outside the United States and to not file any claim for this assessment in the New York or California BCCI SA liquidations or in any liquidation proceeding involving BCCI in Luxembourg, the Cayman Islands or elsewhere.

21. Subject to paragraph 20, the Board of Governors, FDIC, RTC, OTS, OCC and the New York and Cali-

fornia Banking agree to forego additional civil monetary penalty and other similar damage actions wherein they seek funds from or make claims against the Worldwide Victims Fund, the liquidation estates in the New York and California liquidation proceedings for BCCI S.A., and foreign assets and liquidation estates of BCCI, except as follows:

(a) The FDIC, RTC, OTS, OCC and New York and California Banking specifically reserve their ability, as conservators, liquidators and receivers, and potential conservators, liquidators and receivers, to file compensatory claims in the foreign liquidation process, in accordance with the appropriate foreign law. Provided, however, that if Independence Bank and First American are sold or otherwise disposed of without loss to the Bank Insurance Fund, the FDIC will not file any such claim.

(b) Further, the FDIC, RTC, OTS, OCC, New York Banking and California Banking further reserve their ability on behalf of U.S. financial institutions acting as such or in their corporate capacity, or acting as a conservator, liquidator or receiver to pursue civil contract claims.

(c) Additionally, the Board of Governors and joint issuers of the Board of Governors Orders may enforce the Board's Orders or subsequent orders issued by them in connection with the required divestiture of BCCI's interests in First American or Independence Bank.

(d) The SEC agrees to forgo any enforcement action against BCCI related to the acquisition and sale of stock and other securities in connection with the financial institutions described in the U.S. Information.

(e) The Court Appointed Fiduciaries also agree to cooperate with the Board of Governors, FDIC, RTC, OTS, OCC, and SEC in their investigations of BCCI-related wrongdoing, and in related proceedings, in the manner described in paragraph 17 above.

(f) The Court Appointed Fiduciaries release any and all claims which they may have against the Board of Governors, FDIC, RTC, OTS, OCC, SEC, New York Banking and California Banking for actions taken in their respective regulatory capacities.

(g) Nothing in this Agreement bars New York Banking or California Banking from recovering their administrative expenses from their respective liquidation proceedings, in accordance with their respective state laws.

22. The United States and the DANY agree that, should the U.S. District Court and the N.Y. Supreme Court accept the pleas contemplated in paragraphs 1 and 4 above, and should the U.S. District Court enter the Forfeiture Order all pending criminal charges heretofore brought against BCCI by either of them shall be concluded and neither will bring any additional criminal charges against BCCI for matters occurring before July 5, 1991.

23. Pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, the parties agree that the specific sentence, including the Forfeiture Order, set forth in this Agreement provides the appropriate disposition of this case and that the parties will ask the Court to enter a Judgment of Conviction and issue a Forfeiture Order consistent with this Agreement within 10 days of the entry of the pleas in this case, considering that time is of the essence (or such other date as the U.S. District Court may set). If the U.S. District Court accepts the agreed sentence including the forfeiture as set forth above, the Court Appointed Fiduciaries, on behalf of BCCI, may not withdraw the plea contemplated in paragraph 1 above as a matter of right under Federal Rule of Criminal Procedure 11(e)(2) and (4). The Court Appointed Fiduciaries, on behalf of BCCI, understand that the Forfeiture Order of the U.S. District Court is enforceable both as a part of the sentence and in the same manner as a civil judgment. Should the judge refuse to accept the forfeiture

aspect of the sentence, this Agreement shall become null and void and no party will be bound hereto.

24. The Court Appointed Fiduciaries and their attorneys acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to induce the Court Appointed Fiduciaries to enter a plea of guilty on behalf of BCCI. The Court Appointed Fiduciaries understand that failure to abide by any term of the Agreement is a violation of the Agreement and may render it null and void or result in such sanction as may be determined by the U.S. District Court or N.Y. Supreme Court. The Court Appointed Fiduciaries further agree this Agreement shall be filed and become a part of the record in the U.S. District Court and the N.Y. Supreme Court.

25. The parties hereto understand and agree that all of the agreements contained herein shall be conditional on each such agreement and if, for any reason, the U.S. District Court, the N.Y. Supreme Court, or any other United States court of competent jurisdiction shall find any provision of this Agreement to be unenforceable, this Agreement may become null and void, at the option of either the DOJ, DANY and Court Appointed Fiduciaries, and no party hereto will be bound hereto.

26. This Agreement may be executed in one or more identical counterparts, whether transmitted by telecopier or otherwise. Each such counterpart shall be deemed to be an original for purposes of this Agreement.

27. This Agreement sets forth the entire understanding of the parties hereto with respect to the subject matter hereof. Except as explicitly set forth in this Agreement, there are no representations, warranties, or inducements —oral, written, expressed or implied—that in any way affect the validity of this Agreement or any of its terms. All prior negotiations, oral and written, are merged in this Agreement. Evidence of such negotiations, including prior drafts, shall not be admissible for any purpose in

any proceeding related to this Agreement or its performance. Any amendments shall be with the mutual, written consent of the parties.

28. This Agreement shall be governed by and construed in accordance with the laws of the United States of America, except with respect to the matters contemplated in paragraph 4 through 7 hereof which, only to the extent necessary, shall be construed in accordance with applicable New York law.

29. The Court Appointed Fiduciaries agree to a tolling of any applicable statute of limitations as to criminal matters related to BCCI during the term of this Agreement and for 90 days thereafter.

WAIVER OF TRIAL RIGHTS

30. The Court Appointed Fiduciaries have read the charges against BCCI contained in the U.S. Information and the N.Y. Indictment, and those charges have been fully explained to them by their attorneys.

31. The Court Appointed Fiduciaries understand that in accordance with federal law, 18 U.S.C. Section 3013, upon entry of judgment of conviction, BCCI will be assessed $50 for each count, in addition to any other penalty imposed pursuant to this Agreement. Similarly, the Court Appointed Fiduciaries understand that in accordance with New York law, Penal Law Section 60.35, each of the pleading corporate entities upon entry of judgment of conviction, will be assessed a $100 mandatory surcharge and a $2 crime victim assistance fee, in addition to any other penalty imposed.

32. The Court Appointed Fiduciaries understand that by entering a guilty plea on behalf of BCCI, they surrender certain rights under federal and New York State law, including the following:

(a) If BCCI persisted in a plea of not guilty to the charges against it, BCCI would have the right to

a public and speedy trial. The trial could be either a jury trial or a trial by the judge sitting without a jury. BCCI has a right to a jury trial. However, in order that the trial be conducted by the judge sitting without a jury, BCCI, under New York law, and BCCI, the government and the judge, under federal law, all must agree that the trial be conducted by the judge without a jury.

(b) In the federal and New York prosecutions, if the trial is a jury trial, the jury would be composed of twelve laypersons selected at random. BCCI and its attorney would have an opportunity to seek the removal of prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising so-called peremptory challenges. The respective juries would have to agree unanimously before it could return a verdict of either guilty or not guilty, as to each count of the U.S. Information and the N.Y. Indictment. The respective juries would be instructed that BCCI is presumed innocent, and that it could not convict BCCI unless, after hearing all the evidence, it was persuaded of BCCI's guilt beyond a reasonable doubt, and that it was to consider each count of the U.S. Information and the N.Y. Indictment separately.

(c) If BCCI and the government waive the right to a jury trial, the appropriate court after hearing all the evidence, and considering each count separately, would determine whether or not it was persuaded of BCCI's guilt beyond a reasonable doubt in connection with the U.S. Information and the N.Y. Indictment.

(d) At a federal and New York state trial, whether by a jury or a judge, the prosecution would be required to present its witnesses and other evidence against BCCI. BCCI would be able to confront those prosecution witnesses and its attorney

would be able to cross-examine them. In turn, although it would not be obligated to do so, BCCI could require the attendance of its witnesses within the territorial jurisdiction of the United States through the subpoena power of the court, or in connection with the N.Y. Indictment, as provided under New York law.

(e) BCCI would have the right to have the charges outlined in the U.S. Information brought by indictment upon the concurrence of not less than 12 members of a grand jury, comprised of at least 16 and not more than 23 persons, that there is probable cause for the charges.

(f) Should the plea to the U.S. Information occur prior to entry of the guilty plea to the New York Indictment, the Court Appointed Fiduciaries waive any defense to the N.Y. Indictment based upon the New York State Double Jeopardy law in order to permit the guilty plea to the New York State Indictment to be entered as provided herein.

33. The Court Appointed Fiduciaries, on behalf of BCCI, understand that by entering a plea of guilty as provided herein, the Court Appointed Fiduciaries, on behalf of BCCI, are waiving all the rights set forth in the prior paragraph. The Court Appointed Fiduciaries' attorneys have explained those rights to the Court Appointed Fiduciaries, and the consequences of the waiver of those rights as contemplated herein. The Court Appointed Fiduciaries understand that they are waiving all appellate issues that might have been available if they had exercised its right to trial.

34. Upon imposition of the sentence contemplated herein, the DOJ will move to dismiss the remaining charges against BCCI currently pending in any U.S. District Court.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of December 19th, 1991.

Agreed by United States, and the People of the State of New York:

By:

Department of Justice

Through:

William P. Barr
Attorney General

By /s/ George J. Terwilliger
GEORGE J. TERWILLIGER
Acting Deputy Attorney General

By /s/ Robert S. Mueller III
ROBERT S. MUELLER III
Assistant Attorney General
Criminal Division

By /s/ [Illegible] Acting
SHIRLEY D. PETERSON
Assistant Attorney General
Tax Division

By /s/ Stuart M. Gerson
STUART M. GERSON
Assistant Attorney General
Civil Division

People of the State of
New York

By:

/s/ Robert M. Morgenthau
ROBERT M. MORGENTHAU
District Attorney
New York County

And the following
United States Attorneys:

/s/ J.B. Stephens
JAY B. STEPHENS
District of Columbia

/s/ Robert W. Genzman
ROBERT W. GENZMAN
M.D. Florida

OTTO G. OBERMAIER
S.D. New York

/s/ Joe D. Whitley
JOE D. WHITLEY
N.D. Georgia

/s/ Lourdes G. Baird
LOURDES G. BAIRD
C.D. California

/s/ Dexter W. Lehtinen
DEXTER W. LEHTINEN
S.D. Florida

Agreed by Court Appointed Fiduciaries

By:

But in the name and on behalf of the company by authority of the court and without personal liability

/s/ JD, CF, BAS

COMMISSAIRES OF BCCI HOLDINGS (LUXEMBOURG) S.A., not in their individual capacities

/s/ Brian Smouha
BRIAN SMOUHA

/s/ Jacques Delvaux
JACQUES DELVAUX

/s/ Constant Franssone
CONSTANT FRANSSONE

COMMISSAIRE OF BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A., not in his individual capacity

/s/ Brian Smouha
BRIAN SMOUHA

JOINT PROVISIONAL LIQUIDATORS OF BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LTD., and INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LTD., not in their individual capacities

/s/ Ian Wight
IAN WIGHT

ROBERT AXFORD

Agreed by U.S. Regulators:

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

By: /s/ William W. Wiles
WILLIAM W. WILES
Secretary

FEDERAL DEPOSIT INSURANCE CORPORATION

By: /s/ William Taylor
WILLIAM TAYLOR
Chairman

RESOLUTION TRUST CORPORATION

By: /s/ William Taylor
WILLIAM TAYLOR
Chairman

OFFICE OF THE COMPTROLLER OF THE CURRENCY

By: /s/ Robert L. Clarke
ROBERT L. CLARKE
Comptroller of the Currency

OFFICE OF THRIFT SUPERVISION

By: /s/ Timothy Ryan
TIMOTHY RYAN
Director

SECURITIES AND EXCHANGE COMMISSION

By: /s/ Richard C. Breeden
RICHARD C. BREEDEN
Chairman

Agreed by New York State Regulators:

SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, in his capacity as Liquidator of the New York Agency of Bank of Credit & Commerce International, S.A.

By: /s/ Derrick D. Cephas
Name:
Title:

By:
JAMES E. GILLERAN

SUPERINTENDENT OF BANKS OF STATE OF CALIFORNIA, As Such and As Liquidator of California Property and Business of Bank of Credit and Commerce International, S.A.

Agreed by California State Regulators:

SUPERINTENDENT OF BANKS OF STATE OF CALIFORNIA, As Such and As Liquidator of California Property and Business of Bank of Credit and Commerce International, S.A.

/s/ James E. Gilleran
JAMES E. GILLERAN
Superintendent

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 91-0655

Washington, D.C.
January 24, 1992
10:00 a.m.

UNITED STATES OF AMERICA

vs.

#1—BCCI HOLDINGS (LUXEMBOURG), S.A.,

#2—BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A.,

#3—BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED,

#4—INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED,

Defendants

TRANSCRIPT OF PLEA ACCEPTANCE
AND SENTENCE BEFORE THE
HONORABLE JOYCE HENS GREEN
UNITED STATES DISTRICT JUDGE

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[2]

PROCEEDINGS

THE DEPUTY CLERK: Criminal Action 91-655, United States of America versus BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce Interna-

tional, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited. Mr. Raphaelson, Mr. Carver, Mr. Cassella, Mr. Dubester for the Government; Mr. Nussbaum, Mr. Lewis, Mr. Davis, Mr. Sheldon and Mr. Smouha for the Defendants.

THE COURT: Fifteen days ago, on January 9th of this year, pursuant to a scheduled proceeding, the four corporate defendants, BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, collectively referred to as the BCCI defendants, appeared in open court.

Brian Smouha, in his authority as court-appointed fiduciary and as designated representative of the other court-appointed fiduciaries, also collectively court-appointed fiduciaries, tendered the Defendants' guilty pleas to the superseding information which had been filed in this Court on December 19th, 1991. That superseding information, in essence, charges the BCCI defendants with conspiracy to conduct the affairs of the enterprise through a pattern of racketeering activity, in violation of Title 18, United States Code, Sections [3] 1962(c) and 1962(d), and aiding and abetting under Section 2 of that title.

The written plea agreement between the United States of America and the four BCCI defendants was also filed that date, and in accordance with the Federal Rules of Civil Procedure, Rule 11(e)(1)(C), the parties have agreed that the specific sentence set forth in that plea agreement, including the forfeiture provisions, is the appropriate disposition of the case.

The Court makes the following findings:

By their guilty pleas in this United States District Court for the District of Columbia, the BCCI corporate defendants have expressly made waivers of venue and have proceeded to their guilty pleas by way of a superseding in-

formation, expressly waiving their constitutional rights to indictment and trial either by jury or by the Court. They have further expressly waived other constitutional rights, in written form and orally at the January 9th hearing, including, inter alia, the right to confrontation, to cross-examination, to put the Government to its burden of proof, and to elect whether or not to put on a defense. They have further expressly waived their rights of appeal.

All of the Defendants' waivers have been made knowingly and voluntarily, with full and informed understanding of the nature, contents and consequences of the pleas. The Defendants' [4] guilty pleas have followed valued advice of their various counsel, proclaimed satisfactory to the Defendants.

The Defendants are competent to make these guilty pleas which have been tendered by the court-appointed fiduciaries through Mr. Smouha. Those court appointments are recognized and accepted by this Court.

There have been no promises, threats, coercion, or duress of any kind made to the Defendants in the process that led to the plea agreement or in the tendering of that plea agreement.

The written plea agreement constitutes the full agreement of the parties. It sets forth their entire understanding and includes the written memorandum of intent filed also on December 19, 1991. And all parties have further agreed and accepted at the January 9th hearing their understanding that, in addition to other provisions of the specific sentence agreed upon, there would be, under 18 U.S.C. 3013(a)(2)(B), a $200 assessment for each defendant in each count of this information upon entry of conviction.

There is a full and detailed factual predicate for the guilty pleas. The BCCI corporations, as they have stated through their court-appointed fiduciaries, are pleading guilty because they are in fact guilty of the serious offenses and each of the underlying acts charged in the superseding information.

The BCCI defendants have not only agreed to plea guilty [5] and have done so, but urge the Court to accept their guilty pleas and the proposed sentence. The United States of America joins in urging the Court to accept those pleas of guilty and the proposed disposition.

The BCCI defendants and the United States of America have articulated at length in their plea agreement, at the January 9th hearing, and again through their more recent responses to nonparty filings, their precise views as to why in the public interest this Court should accept the guilty pleas and the accompanying proposed specific sentence.

Additionally, although 18 U.S.C. 1963(i) expressly prohibits nonparties from intervening in this criminal case, except as provided in Subsection (1), this Court has considered each of the submissions timely made by the persons or entities not parties to this criminal proceeding.

The Court realizes, as Mr. Nussbaum articulates so well in one of his written submissions, that, quote, there is no agreement that can be reached which would satisfy all of the diverse and irreconcilable parochial interests, end quote, that exist in this case. Nonetheless, the plea agreement now before the Court reflects on a truly global measure extraordinary efforts and amazing cooperation of a multitude of signatories representing a myriad of jurisdictions to fully settle actions against the corporate defendants, which had operated in 69 countries around the globe, and through that plea resolution, to [6] locate and protect all realizable assets of BCCI for the ultimate benefit of the depositors, creditors, United States financial institutions, and other victims of BCCI. The promise of the plea agreement is that those extraordinary efforts, that amazing cooperation, shall continue.

Upon consideration of the views of the parties and the nonparties to this case, the Court concludes that acceptance of the plea agreement is in the public interest. The agreement permanently incapacitates BCCI from ever again doing business in the United States, except, of course, as part of the liquidation proceedings currently pending.

Through the world-wide victims fund to be created pursuant to the agreement, innocent victims of BCCI's wrongdoing can recover at least a portion of lost assets in as fair a manner as possible—equitable, orderly, and expeditious. Because the fund will be administered on a global scale through unified proceedings, piecemeal and unfair distribution can be avoided.

The plea agreement provides for the rehabilitation of United States financial institutions harmed by BCCI's criminal activity. Infusion of capital gained pursuant to the agreement will largely minimize the cost of potential damage inflicted by BCCI upon United States banks and other financial institutions and will help to ensure the viability of those institutions.

Importantly, the plea agreement resolves all criminal [7] litigation against BCCI in the United States and, consequently, avoids the high cost of protracted and expensive litigation against those corporate defendants. Moreover, the agreement secures the continuing cooperation of BCCI's court-appointed fiduciaries in the investigation and prosecution of individuals involved in related criminal activity. Such facilitation will result in the massive release of documents not otherwise readily obtainable, if at all, and, as a result, will most likely assist in bringing culpable individuals to justice while substantially increasing the amount of assets available to creditors.

Accordingly, in furtherance of the public interest and at the request of the parties, the Court accepts the four corporate BCCI defendants' pleas of guilty and the plea agreement between those defendants and the United States of America, and will embody in the judgment and sentence the disposition provided for in the plea agreement.

The Court finds further that there is in the record information sufficient to enable the meaningful exercise of sentencing authority without the requirement of a presentence investigation and report, and therefore will proceed directly to the sentencing.

But first, unless waived, the parties and counsel are always afforded an opportunity to speak at time of sen-

tence. Mr. Smouha, as the court-appointed fiduciary for the four BCCI corporate defendants, is there anything further you wish to say [8] at this time of sentence?

MR. SMOUHA: No, Your Honor. Nothing further.

THE COURT: All right.

Mr. Nussbaum, as counsel, is there anything further you wish to say, sir?

MR. NUSSBAUM: Nothing further, Your Honor.

THE COURT: Mr. Raphaelson, on behalf of the United States of America, anything further you wish to say, sir?

MR. RAPHAELSON: No, thank you, Your Honor.

THE COURT: As to the sentence. As to each of the BCCI corporate defendants, that is, BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, the Court enters a judgment of conviction on the pleas of guilty to 18 United States Code, Sections 1962(c) and 1962(d) and 18 United States Code, Section 2.

In consideration of the forfeiture provisions, which will hereafter be reflected in a separate order, there will be no additional fine. Each of the corporate BCCI defendants is assessed for the mandatory victim assistance fund, and pursuant to 18 U.S.C. 3013(a)(2)(B), the sum of $200, to be paid within 60 days.

The order of forfeiture will be entered momentarily. And with that order of forfeiture, the provisions of 18 United [9] States Code, Section 1963, become the vehicles through which the claims of the nonparties may be addressed. As counsel have repeatedly said, and the Court agrees, there should be no interest of BCCI or the United States of America in forfeiture of property that properly belongs to others.

The parties have given their assurance that there will not be needless litigation over any (1) claim issue that may come before the Court. And if the (1) claimants

reflect the same spirit of energy and cooperation that has sparked the way and has led the parties to this day, that is, the parties, the other signatories and other courts, then that prophecy can be realized.

The worldwide collapse of BCCI six months ago has brought enormous and continuing tragedy to innocent victims. Fraud and mismanagement by BCCI's former operators ripped through the economic security of more than one million depositors and creditors. It is a fact that whatever is done here today, we cannot now, and not even eventually, completely erase that tragedy. But no one has offered the Court a better alternative than the one accepted by the Court.

We shall, each of us, do the best possible for the most. The judgment entered today, with the accompanying order of forfeiture, opens those doors.

There will be a brief pause.

The order of forfeiture has been signed. Copies of [10] that order of forfeiture, after they have been stamped by my Deputy Clerk, will be made available for those who might have some interest in them.

I wish you all good day.

(Proceedings concluded at 10:15 a.m.)